

**REMARKS**Overview

In the Non-Final Office Action mailed December 8, 2009, all of the pending claims 1, 5-13, 16-18, 20-21, 25-31, 33-43, 45, and 47-70 were rejected under 35 U.S.C. §103(a) as being unpatentable over Clough (U.S. Patent 4,496,388). Applicant respectfully traverses these rejections and requests consideration of the following remarks which Applicant believes will place the application in condition for allowance.

U.S.C. §103(a) Rejections

Claims 1, 5-13, 16-18, 20-21, 25-31, 33-43, 45, and 47-70 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Clough. Applicant respectfully disagrees. The Office Action states that Clough teaches a fungicidal composition comprising a metal complex of the compound of formula I (*i.e.*, specifically disclosed triazolylalkanetriol derivatives). Office Action, 12/08/2009, page 2. It further states that Clough discloses that the fungicidal compounds can comprise additional compounds such as auxins, anionic surfactants and ingredients, such as calcium carbonate. *Id.* The Office Action further states that Clough teaches that such composition may be used as aqueous dispersions and may be used to control fungi, including *phytophthora* and *rhizoctonia*, by application onto plants and/or seeds. *Id.* However, the Office Action admits that Clough does not teach or suggest “the use of auxins together with micronutrients to protect plants from attack by fungi and insects and their larvae in the absence of triazole and imidazole compounds.” Office Action, 12/08/2009, page 4. Therefore, for at least the following reasons, Applicant respectfully traverses the contention that all pending claims are unpatentable over Clough.

First, Clough neither discloses nor suggests the use of auxins to protect against attack by fungi and insects and their larvae, in the absence of his fungicidal triazole and imidazole compounds. Applicant respectfully submits that the recitation in the independent claims of “a [fungi-, insect-] inhibiting component consisting of a [synthetic] auxin” is neither disclosed nor suggested by Clough. However, without conceding the validity of the current rejections, Applicant has amended independent claims 1, 25 and 28 to recite the step of “applying a principal fungi-inhibitor...said principal fungi-inhibitor [consisting of, being] at least one plant hormone, said at least one plant hormone including [an, a] [synthetic] auxin” Independent claims 60 and 68 have been similarly amended.

Applicant respectfully submits that Clough neither discloses nor suggests that a fungi-inhibitor consisting of at least one plant hormone including auxin could be used as the principal inhibitor against attack by fungi or insects or their larvae. Furthermore, Clough does not provide any motivation to one of ordinary skill in the art to use a principal fungi-inhibitor consisting of at least one plant hormone including auxin in view of Clough’s teaching of the use of the compounds, salts, and metal complexes of disclosed formula (I) as fungicides. Clough, col. 6, ll. 14-20. For at least the aforementioned reasons, Applicant respectfully submits that independent claims 1, 25, 28, 60 and 68, as amended, and their respective dependent claims are patentably distinct over Clough.

Second, the cited portions of Clough disclosed in the Office Action fail to teach or suggest each and every claim limitation of the above-referenced claims. *See In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974) (stating that to establish prima facie obviousness of a claimed invention, all the claimed features must be taught or suggested by the prior art). As the Board of Patent Appeal and Interferences has confirmed, a proper obviousness determination

requires that “[w]hen determining whether a claim is obvious, an examiner must make ‘a searching comparison of the claimed invention – *including all its limitations* – with the teaching of the prior art.’” *In re Wada and Murphy*, BPAI Appeal 2007-3733 (Jan. 14, 2008), citing *In re Ochiai*, 71 F.3d 1565, 1572 (Fed. Cir. 1995) (emphasis added).

Independent claims 33 and 51, as amended, and their respective dependent claims, recite a method step of “applying an insect-inhibitor...said insect-inhibitor [consisting of, being] at least one plant hormone, said at least one plant hormone including [an, a] [synthetic] auxin.” Independent claim 54 and its dependent claims 55-59 have been similarly amended. Clough neither discloses nor suggests that a plant hormone including an auxin may be used for protecting plants from attack by insects and their larvae. Clough, at col. 10, ll. 44-48, states that compositions of his invention can comprise compounds having insecticidal activity and, at col. 11, ll. 11-12, states that such “suitable insecticides are Pirimor, Croneton, dimethoate, Metasystox, and formothion.” But, this statement by Clough effectively teaches away, because one of ordinary skill in the art would not be motivated to apply auxin as an insect-inhibiting component, but rather would be motivated to use one of the “suitable insecticides” taught by Clough for this purpose. Thus, Clough cannot reasonably be interpreted to disclose the aforementioned feature of independent claims 33, 51, 54, and their respective dependent claims. Therefore, claims 33-43, 45, and 47-59 are patentably distinct over Clough and should be allowed, because it would not have been obvious to one of ordinary skill in the art to apply at least one plant hormone including auxin as an insect-inhibitor.

Third, dependent claims 8-13, 30, 40-42, 56, and 63-65 recite a range of application rates for the applied auxin. The Office Action fails to cite any passage in Clough where the claimed auxin application rates are disclosed or suggested. Furthermore, the Office Action fails to cite

any passage in Clough that would motivate one of ordinary skill in the art to apply auxin in the range of application rates claimed. Similarly, dependent claim 17, as amended, recites that the metal is present in a range of about 0.001 to about 5.0 percent-by-weight. The Office Action cites Clough at col. 10, ll. 1-18 for teaching calcium lignosulphonate and Clough at col. 9, ll. 3-19 for teaching calcium carbonate. However, neither of these passages describes the metal range claimed in dependent claim 17. The Federal Circuit has stated that “rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” MPEP §2142 (citing *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006)). Because the Office Action does not provide any articulated reasoning for the rejection of dependent claims 8-13, 30, 40-42, 56, and 63-65, Applicant respectfully requests that such rejection over Clough be withdrawn.

As admitted in the Office Action and previously stated herein, Clough neither discloses nor suggests the use of auxins to protect against attack by fungi and insects and their larvae, in the absence of his fungicidal triazole and imidazole compounds. Furthermore, Clough neither discloses nor suggests the claimed use of at least one plant hormone including auxin as the principle inhibitor for controlling the attack of fungi and of insects and their larvae on plants. In the absence of any such teaching, motivation, or suggestion by Clough, the rejection of the pending claims as being unpatentably obvious over Clough must be withdrawn.

For the above stated reasons, Applicant respectfully submits that claims 1, 5-13, 16-18, 20-21, 25-31, 33-43, 45, and 47-70, as amended, are patentably distinct over Clough and respectfully requests that the present rejections under 35 U.S.C. §103 be withdrawn.

Claim Amendments

In addition to the claim amendments discussed above, independent claims 1, 25, 28, 33, 51, 54, 60, and 68 have been amended to remove the recitation of “an aqueous solution including.” Claims 1, 17, 33, 51, 54, 58, and 60 have been amended to correct any lack of antecedent basis. Independent claims 1, 25, 28, 33, 51, and 54 and dependent claims 18, 31, 43, 45, 57, 59, and 69 have been further amended to clarify what is claimed. Claims 63-67 have been amended to depend from claim 60 rather than claim 61. Finally, claim 67 has been amended to correct a minor typographical error.

New Claims

New claims 71-75 have been added. New claims 71-75 are patentably distinct over Clough at least by virtue of their dependence from allowable independent claims.

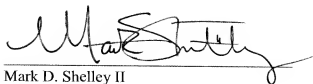
Request for Extension of Time/Authorization to Charge Deposit Account for Any Required Fees

Applicant herewith petitions the Director of the USPTO to extend the time for reply to the Office Action mailed December 08, 2009 for three (3) months. Applicant believes that this response is timely submitted under 37 C.F.R. §1.7 with the payment for a three month extension of time of \$555. If, however, any additional extension of time and/or fees are deemed required, the USPTO is hereby authorized to charge any fees which should have been filed herewith to our Deposit Account 50-0897 (SOR028/189341) from which the undersigned is authorized to draw.

Conclusion

In the present response, Applicant submits that the pending claims 1, 5-13, 16-18, 20-21, 25-31, 33-43, 45, and 47-70 are patentably distinct over Clough, as cited in the previous Office Action. Therefore, Applicant respectfully requests the allowance of pending claims 1, 5-13, 16-18, 20-21, 25-31, 33-43, 45, and 47-70 as well as new dependent claims 71-75.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark D. Shelley II", written over a horizontal line.

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Date: June 8, 2010